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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. [redacted] 147

IRVING BERLIN, IRVING BERLIN MUSIC CORPORATION, CHAPPELL & CO., INC., THE PLAYERS MUSIC CORPORATION, DE SYLVA, BROWN & HENDERSON, INC., WILLIAMSON MUSIC, INC., T. B. HARMS COMPANY, MILLS MUSIC, INC., SHAPIRO, BERNSTEIN & CO., INC., ROBBINS MUSIC CORPORATION, LEO FEIST, INC., and MELODY LANE PUBLICATIONS, INC.,

Petitioners,

against

E. C. PUBLICATIONS, INC., THE AMERICAN NEWS COMPANY, WILLIAM M. GAINES, ALBERT B. FELDSTEIN, JOHN PUTNAM, LEONARD BRENNER, FRANK JACOBS, LARRY SEIGEL and JACK RICKARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the within action, dated and entered March 23, 1964, affirming the judgment of the United States District Court for the Southern District of New York, entered on July 9, 1963, granting defendants'

cross application for summary judgment dismissing each and every cause of action set forth in the complaint herein on the merits, except as to the second and seventh causes of action.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (R. 163a-168a)* is reported in 219 F. Supp. 911, 133 U.S.P.Q. 298. The opinion of the Court of Appeals affirming the judgment of the District Court (Appendix I, *infra*, p. 26) is reported in 329 F. 2d 541, 141 U.S.P.Q. 1.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed (Appendix II, *infra*, p. 35) is dated and was entered on March 23, 1964. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

Questions Presented for Review

Whether under § 1(a) and § 7 (former § 6) of the Copyright Act of 1909:

(1) There is any legal justification for the determination of the Court of Appeals, that the copyright owner does not have the exclusive right to make a burlesque or parody version of his work.

(2) There is any legal justification for the determination of the Court of Appeals that a burlesque or parody version of a copyrighted work, being in effect literary or dramatic criticism, must be treated differently from any other appropriation.

---

* Record references are to pages of the Appendix to Appellants' Brief below.

Statute Involved

The only statutory provisions involved are §1(a) and §7 (former §6) of the Copyright Act of March 4, 1909, c. 320 (35 Stat. 1075, *et seq.*, U.S.C. Title 17) (Appendix III, *infra*, p. 36).

Statement of the Case

The basis for federal jurisdiction in the District Court is the Act of June 25, 1948, c. 646 (62 Stat. 931, U.S.C. Title 28, §1338(a)), reading as follows:

> "(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases."

The action was brought on behalf of twelve music publishers. It was instituted at the instance of Music Publishers' Protective Association, Incorporated, the membership of which comprises most of the leading publishers of popular music in the United States, in conjunction with a series of like actions, in a concentrated effort to curtail a condition which has become a serious threat to the members of said association. It comprises twenty-five causes of action, each being for the infringement of the copyright in one of plaintiffs' renowned musical compositions written by one of the most famous writers of popular music of their day, which compositions, because of their extreme popularity through the years, have become known in the trade and to the public as "Old Standards" (R. 112a).

The infringement arises out of the publication of parody versions of the lyrics of plaintiffs' musical compositions, in "A 20-Page Parody Song Book", as a separate "Special Bonus" of "A Collection Of Parody Lyrics To 57

Old Standards" with defendants' magazine entitled "Mad". This parody song book was included as a bonus with defendants' magazine, for the avowed purpose of capitalizing upon plaintiffs' "Old Standards" and thereby enhancing the sales of defendants' magazine, by featuring such "Special Bonus" to be acquired therewith for the price of the magazine "Our Price 50¢ Cheap". This is expressly emphasized: "Also, there'll be more chance you'll need extra song books for everybody to see . . . and we'll sell more copies of this Annual". Under the title of each parody lyric is the designation "Sung to the tune of ....." or "To the tune of ....." one of plaintiffs' renowned compositions (R. 101a-109a).

A comparison of the original lyrics with the parody versions confirms that the principal lines of the original lyrics are invariably repeated with colorable alterations in the parody lyrics and in most instances with the same or substantially the same rhyme. Accordingly, all of the plaintiffs' lyrics in defendants' "Parody Song Book" are obviously what they were intended and specifically represented to be; "Parody Lyrics" to plaintiffs' "Old Standards" (R. 118a-151a).

Following are four examples, the first line in each instance from plaintiffs' lyric and the second line in italics from defendants' parody version:

Plaintiffs' "Cheek To Cheek"

Defendants' "Sheik To Sheik"

(R. 123a-124a)

Heaven, I'm in Heaven, And my heart
beats so that I can hardly speak;
Heaven, we're in heaven, and our earth
with rich black oil just seems to leak,

And I seem to find the happiness I seek
And we always find the happiness we seek

When we're out together dancing, Cheek to Cheek.
When we're talking dough together sheik to sheik.

Heaven, I'm in Heaven, And the cares that hung
around me thru the week
*Heaven, this is heaven, and we're such a fine
and merry little clique,*

Seem to vanish like a gambler's lucky streak
We can always find the happiness we seek,

When we're out together dancing, Cheek to Cheek.
When we're talking oil together sheik to sheik.

Oh! I love to climb a mountain,
And to reach the highest peak,
*Oh, we love to go out riding
in a Cadillac that's sleek,*

But it doesn't thrill me half as much
As dancing, Cheek to Cheek.
*And we'd enjoy it side by side there,
sitting sheik to sheik.*

Oh! I love to go out fishing
In a river or a creek,
*Oh, we love to buy a navy from a
rich ship-owning Greek,*

But I don't enjoy it half as much
As dancing, Cheek to Cheek.
*But we all enjoy dough twice as much that's
passing sheik to sheik.*

To Heaven, I'm in Heaven and my heart
beats so that I can hardly speak.
*To heaven, we're in heaven, and our modest
goal's a million barrels a week.*

And I seem to find the happiness I seek
All our subjects beg, and they are up the creek.

When we're out together dancing, Cheek to Cheek.
While we're talking dough together sheik to sheik.

Plaintiffs' "I've Got You Under My Skin"

Defendants' "I Swat You Hard On The Skin"

(R. 130a-131a)

I've got you under my skin,
I swat you hard on the skin!

I've got you under my skin.
I swat you hard on the skin!

I tried so not to give in,
A pledgee needs discipline!

I said to myself, "This affair never will go so well."
I say to myself, college men always should have such fun;

I've got you under my skin.
I swat you hard on the skin!

I'd sacrifice anything, Come what might,
You'd sacrifice anything, come what may,

for the sake of having you near,
For the sake of joining our clan;

In spite of a warning voice that comes in the night
Remember the message our paddling raps out all day

And repeats and repeats in my ear;
And repeats and repeats on your can:

"Don't you know, little fool, you never can win,
Don't you know, little fool, next year you can grin!

But each time I do, just the thought of you
For a pledge who is new will bend down before you

makes me stop, Before I begin
And you'll swat . . . till blisters begin. . . .

'Cause I've got you under my skin.
You'll swat him hard on the skin!

Plaintiffs' "THE HOUSE I LIVE IN"

Defendants' "THE HOUSE I LIVE IN"

(R. 134a-135a)

The house I live in,
The house I live in

A plot of earth, a street,
Is on a plot of land

that's America to me.
That's "Suburban Life" to me!

the workers at my side
The termites are at work;

the air of feeling free
For this life of misery!

that's America to me.
That "Suburbia" was for me!

The town I live in
The house I live in

Plaintiffs' "THE GIRL NEXT DOOR"

Defendants' "THE FOLKS NEXT DOOR"

(R. 149a)

How can I ignore
How can we ignore

the girl next door?
The folks next door;

I love her more
They bought a four-

than I can say.
Door Chevrolet.

And though I'm heartsore
Since we can't ignore

the girl next door
The folks next door,

won't display,
Than we can pay!

The Girl Next Door.
With the folks next door.

It was stipulated that "the plaintiffs are the proprietors of, or are possessed of all rights under, valid and subsisting copyrights in their respective compositions, the subject matter of this action"; that the lyrics contained in the insert of plaintiffs' magazine "are directed to be 'Sung to the tune of:' plaintiffs' respective musical compositions", having "the same meter as the lyrics of the said compositions and can be sung to the music thereof"; and that "plaintiffs never gave any authorization, permission, consent or license" for defendants' use thereof (R. 117a).

The District Court denied plaintiffs' motion for summary judgment with respect to each of their causes of action; granted defendants' cross application for summary judgment with respect to twenty-three causes of action; and held that "there is a question of fact to be determined" with respect to the remaining two causes of action (R. 169a).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals herein for which there is no legal precedent is in conflict with the decision of the United States Court of Appeals for the Ninth Circuit which was affirmed by an equally divided court and has decided an important question of federal law which has not been but should be settled by this Court.

Determination of the District Court

The District Court recognized that "Infringement occurs when the accused work is a colorable copy or paraphrase of the copyrighted work" (R. 164a). Furthermore, it expounded the true test of a piracy, saying "In Harold Lloyd Corp. v. Witwer, 65 F. 2d 1 (9th Cir.), appeal dismissed per stipulation, 296 U. S. 669 (1933), the court quoted from Justice Story that the true test of piracy is whether defendant used plaintiff's plan as a model, with colorable alterations, or whether defendant's item is a product of his own labor, that is, whether defendant's book is 'a servile or evasive imitation of the plaintiff's work, or is a bona fide original compilation from other common or independent sources' 65 F. 2d at 17" (R. 164a, 165a). The reference is to the opinion of Justice Story in *Emerson* v. *Davies*, 8 Fed. Cas. 615, 624, No. 4,436, 3 Story 768.

In accord therewith the District Court found "It is clear that a parody of a copyrighted work is an infringement of the copyright. *Benny* v. *Loew's Inc.*, 239 F. 2d 532 (9th Cir. 1956), aff'd 356 U. S. 43 (1958); *Hill* v. *Whalen & Martell*, 220 Fed. 359 (S.D.N.Y. 1914)" (R. 165a).

However, the District Court, while recognizing that a parody of a copyrighted work is clearly an infringement, disregarded defendants' concession that the contents of the specifically designated "A 20-Page Parody Song Book"

were "A Collection Of Parody Lyrics To 57 Old Standards" and the patent similarities in the lyrics of the respective works. Instead, it promulgated an unprecedented and untenable concept of copyright law that: "Defendants have not parodied plaintiffs' lyrics. Rather, they have satirized, in original words and thoughts several aspects of modern life", regardless of such conclusive evidence of most flagrant infringement, under the purview of the determination in its cited case of *Harold Lloyd Corp.* v. *Witwer, supra* (R. 165a).

In Century Dictionary (Vol. IV, p. 42971) a "parody" is defined as a writing "made ridiculous by the subject or method of treatment", with the pertinent quotation from Dryden "They were satiric poems, full of parodies that is, of verses patched up from great poets and turned into another sense than their author intended".

Determination of the Court of Appeals

The Court of Appeals, at variance with the holding of the District Court, recognized the relation between "parodied" and "satirized", in referring to the contents of defendants' "Parody Song Book" as "satiric parody lyrics". However, it rejected plaintiffs' claim of infringement in the absence of defendants' "failure to reproduce the music of plaintiffs' compositions in any form whatsoever" (App. I. *infra*, p. 27).

Furthermore, the Court, contrary to the holding of the District Court, based its determination upon the theory that an unauthorized parody or burlesque version of a copyrighted work is, in effect, literary or dramatic criticism. Therefore, the Court held a parody version must be justified as a "fair use" which, unlike any other appropriation, permits a sufficient taking to be recognizable by ordinary observation as having been appropriated from the copyrighted source or, in the words of the Court "'to recall or conjure up' the object of his satire". To this

effect the Court said:

> "Asserting that the copyright laws restrict the economic benefits of copyrighted works to the copyright holders, they (plaintiffs herein) reject the notion that a parody or burlesque version of the original may ever be justified as a form of 'fair use' which traditionally has permitted a literary critic to employ limited quotations from the copyrighted work under review. Cf. Lawrence v. Dana, 15 Fed. Cas. 25, 61 (No. 8136) (C.C.D. Mass. 1869)". (App. I, *infra*, pp. 29, 30)
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> "While indeed broad, the area in which a copyright proprietor is permitted the exclusive commercial benefits of his copyrighted work is clearly not without limit. In the words of Article I, Section 8, of the Constitution, copyright protection is designed 'To promote the Progress of Science and useful Arts', and the financial reward guaranteed to the copyright holder is but an incident of this general objective, rather than an end in itself." (App. I, *infra*, p. 30)
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> • • • • •
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> "For, as a general proposition, we believe that parody and satire *are* deserving of substantial freedom—both as entertainment and as a form of social and literary criticism. • • • At the very least, where, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper." (App. I, *infra*, p. 34)

The Court of Appeals herein further said "Most contemporary discussions of the treatment to be afforded parody were stimulated by two related cases which arose

in the Southern District of California. See *Loew's, Inc.* v. *Columbia Broadcasting System*, 131 F. Supp. 165 (S. D. Cal. 1955), aff'd sub. nom. *Benny* v. *Loew's, Inc.*, 239 F. 2d 532 (9th Cir. 1956), aff'd by an equally divided court, 356 U. S. 43 (1958); *Columbia Pictures Corp.* v. *National Broadcasting Co.*, 137 F. Supp. 348 (S. D. Cal. 1955)". (App. I, *infra*, p. 31.) It will be noted that there was no appeal from the latter determination of the District Court.

The Court of Appeals herein, in referring to the determination of the District Court in both of the California cases, said the court recognized "the historic importance and social value of parody and burlesque; in both it conceded that the parodist must be permitted sufficient latitude to cause his reader or viewer to 'recall or conjure up' the original work if the parody is to be successful. * * * It was this borrowing from the original to a far greater degree than that required if the parody is to 'recall or conjure up' that original, which caused the court to reject the defense of 'burlesque'; and it was in this context that the Court of Appeals for the Ninth Circuit affirmed Judge Carter's determination". (App. I, *infra*, pp. 31, 32.)

In the said case of *Loew's, Inc.* v. *Columbia Broadcasting System*, 131 F. Supp. 165, affirmed by the Court of Appeals for the Ninth Circuit, there is no concession or statement whatsoever to any such effect. Accordingly, it was definitely not "in this context" that the Court of Appeals affirmed. As will be pointed out *infra*, the holding of the District Court and the Court of Appeals was directly to the contrary, in that as a parody or burlesque version "is no defense to an action for infringement", a "parodized or burlesque taking is to be treated no differently from any other appropriation".

The Court of Appeals herein further said "While the plaintiffs have resolutely insisted that the defendants' use of the original songs as a vehicle for parodies was wrongful, and have alleged, in general terms, that the claimed

infringement 'caused substantial and irreparable damage' they have not indicated with any degree of particularity the manner in which injury might have been inflicted. • • • Rather, plaintiff's appear to seek redress upon a theory of copyright relief, closely resembling recovery for unjust enrichment". (App. I, *infra*, p. 29.)

In *Benny* v. *Loew's Incorporated, supra*, the Court of Appeals determined (p. 537) "The judgment is affirmed upon the findings of fact and conclusions of law of the District Court and for the reasons set forth in the opinion of Judge James M. Carter". The holding of the District Court (131 F. Supp. 165) is therefore pertinent. This is particularly so by reason of the erroneous observation of the Court of Appeals herein, *supra*, with respect to the alleged concession and holding of the District Court therein, "which caused the court to reject the defense of 'burlesque' ", and the purported context in which the Court of Appeals therein affirmed such determination (App. I, *infra*, p. 32).

In fact, every one of the following legal conclusions of the said District Court adopted by the Court of Appeals for the Ninth Circuit, is completely at variance with the legal conclusions of the Court of Appeals herein, set forth *supra*, (131 F. Supp. 165, 173-177, 184, 185):

> "Judicially, the courts have taken a broad view of copyright protection in order to give to the copyright proprietor the exclusive right 'to any lawful use of his property whereby he may get a profit out of it. • • •' King Features Syndicate v. Fleischer, 2 Cir., 1924, 299 F. 533, 536."
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> "It will be noted that Sec. 1, Title 17, U.S.C.A., consisting of five subdivisions, refers to doing the prohibited act 'for profit' only in subd. (c) concerning a 'lecture, sermon, address or similar production, or other nondramatic literary work', and subd. (e) refer-

ring to 'musical composition.' • • • But the factor of use for commercial gain has been considered by the courts in connection with most, if not all, infringements of copyrighted material, regardless of the particular subdivision of Sec. 1, Title 17, U.S.C.A., which is invoked. Thus, in the field of science and the fine arts, we find a broad scope given to fair use. 'This doctrine permits a writer of scientific, legal, medical and similar books or articles of learning to use even the identical words of earlier books or writings dealing with the same subject matter.' Thompson v. Gernsback, D.C.N.Y. 1950, 94 F. Supp. 453, 454. The writer of such works 'invites reviews, comments and criticism and we could add, the use of the books and portions and quotations therefrom for the purpose of the advancement of learning. He does not invite or consent to its use for commercial gain alone.' ''

• • • • • •

''Turning now to American cases involving parody or burlesque, we find illuminating early decisions. The attempt to defend against copyright infringement by the claim that the infringing work was 'merely a parody or burlesque' is not new. Such an attempt has been the subject of several decisions and has been disposed of, not by determining whether the alleged infringing use was parody or burlesque, but by ascertaining whether it amounted to a taking of substantial, copyrightable material. In other words, a parodized or burlesqued taking is treated no differently from any other appropriation.''

• • • • • •

''But Leon v. Pacific Tel. & Tel. Co., 9 Cir., 1937, 91 F. 2d 484, disposes completely of defendants' contentions. There the defendant relied on the fact his numerical telephone directory 'serves a different purpose than plaintiff's alphabetical directory.' 91 F. 2d at pages 486-487 the court said;

'The fact that plaintiff has not chosen to arrange its material in the inverted form used by appellants is no determinant of fair use.' The inversion, without license, is not permitted merely because the holder of the copyright has not so used it. This is settled by the case of Fox Film Corporation v. Doyal, 286 U. S. 123, 127, 52 S. Ct. 546, 547, 76 L. Ed. 1010, where the Supreme Court said: 'The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property.' "

• • • • •

"The mere absence of competition or injurious effect upon the copyrighted work will not make a use fair. The right of a copyright proprietor to exclude others is absolute and if it has been violated the fact that the infringement will not affect the sale or exploitation of the work or pecuniarily damage him is immaterial."

The Court of Appeals for the Ninth Circuit (239 F. 2d 532), as aforesaid, affirmed "upon the findings of fact and conclusions of law of the district court and for the reasons set forth in the opinion of Judge James M. Carter" (p. 537). Furthermore, the Court specifically held, contrary to the holding of the Court below, that there was no legal justification for the defense comprehended in the two questions presented for review herein, saying (pp. 536, 537):

"'Appellants' chief defense is that the use which they made of appellees' photoplay in their television play was a fair use, by reason of the fact that the material which they appropriated from the motion picture, 'Gas Light', was used in the creation of a burlesque, and that by reason of such circumstance, they are not guilty of infringement."

• • • • •

"One person has the sole right to do this—the copyright owner, inasmuch as, under Title 17, U.S.C.A. § 1, he has the exclusive right to make any other version of the work that he desires."

"An apparently alternative contention that the presentation of the burlesque was, in effect, literary or dramatic criticism and, therefore, not subject to an action for infringement of copyright, would seem to be a parody upon the meaning of criticism."

* * * * *

"However, there is only a single decisive point in the case: One cannot copy the substance of another's work without infringing his copyright. A burlesque presentation of such a copy is no defense to an action for infringement of copyright. As was said by the district judge, a 'parodized or burlesque taking is to be treated no differently from any other appropriation; that, as in all other cases of alleged taking, the issue becomes first one of fact, i.e., what was taken and how substantial was the taking; and if it is determined that there was a substantial taking, infringement exists.' 131 F. Supp. 183."

It is respectfully submitted that the Court of Appeals herein is wholly inconsistent in its interpretation of the decision of the Court of Appeals for the Ninth Circuit, in *Benny* v. *Loew's Inc., supra.*

In the first instance, as aforesaid, it makes the erroneous observation that the District Court (131 F. Supp. 165) "conceded that the parodist must be permitted sufficient latitude to cause his reader or viewer to 'recall or conjure up' the original work", that it was the "borrowing from the original to a far greater degree than that required if the parody is to 'recall or conjure up' that original which caused the Court to reject the defense of 'burlesque'; and it was in this context that the Court of Appeals for the

Ninth Circuit affirmed Judge Carter's determination". (App. I, *infra*, pp. 31, 32.) As pointed out, *supra*, there was no holding to any such effect and, in fact, the determination of both the District Court and the Court of Appeals therein was directly to the contrary.

After having applied the said purported holding in the *Benny* case as the basis for its determination in the instant case, to the effect that it is a "fair use" in a parody version of a copyrighted work to appropriate sufficient material therefrom to "recall or conjure up" the original work, the Court of Appeals herein subsequently said that "the Benny holding and its accompanying *dictum* suggesting that a parody could not be justified as a 'fair use' was roundly criticized by many commentators", the only citation being three law student reviews. (App. I, *infra*, p. 32.) It thereupon expressed its disagreement with the "rationale of that opinion", and said that having been affirmed by an equally divided Supreme Court "it is clearly not binding upon us". The Court quotes from *Hertz* v. *Woodman*, 218 U. S. 205, 130 Sup. Ct. 621 (213-214) to the effect "the principles of law involved not having been agreed upon by a majority of the Court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts". (App. I, *infra*, p. 32.)

The Court of Appeals herein thereupon held, contrary to the "principles of law" enunciated in the *Benny* case, that "For, as a general proposition, we believe that parody and satire *are* deserving of substantial freedom—both as entertainment and as a form of social and literary criticism", so that "where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper". (App. I, *infra*, p. 34.)

Accordingly, in the one instance, the Court of Appeals herein is in full accord with such purported determination

in the *Benny* case, and in the other the actual determination in the *Benny* case directly to the contrary is said to be "clearly not binding upon us".

The Decision of the Court of Appeals Herein Is Likewise in Conflict with a Prior Decision of the Same Court Involving the Same Question of Federal Law as Applied to Like Subject Matter.

The case of *Leo Feist, Inc.* v. *Song Parodies, Inc.*, companion case *Robbins Music Corp.* v. *Same*, 146 F. 2d 400 (2nd Cir., Circuit Judges Chase, Clark and Frank concurring) is precisely in point.

The decision of the District Court in both actions was rendered from the bench and is not reported. The Findings of Fact and Conclusions of Law in both actions are contained in the Transcript of Record in the Court of Appeals (pp. 131-136, 138-141) which was submitted to the Court below and has been certified as a part of the record in this Court. (App. IV, *infra*, Findings of Fact and Conclusions of Law in the Feist action which are the same as in the Robbins action.) The District Court made the following pertinent findings in both actions:

> "That defendants' lyrics are written in the same meter and with the same or substantially the same rhyme, as the lyrics of said songs, and are offered for sale and purchased for the same purpose as the original and revised lyrics of said songs, i.e., to be sung to the music of said songs."
>
> "That defendants' lyrics represent paraphrasing and copying with evasion, they are a colorable alteration and an evasive imitation of the lyrics of said songs, which ordinary observation would cause to be recognizable as having been taken from the lyrics of said songs". (App. IV, *infra*, p. 40.)

The District Court, accordingly, concluded "That defendants have infringed the copyrights in plaintiffs' songs". (App. IV, *infra*, p. 41.)

Upon appeal, the same Court of Appeals said, with respect to the same determination in both actions (pp. 400, 401):

> "The District Court held that defendants had flagrantly infringed the plaintiffs' copyrights of certain songs. The evidence fully supports that court's findings of fact which in turn justifies its legal conclusions".

There is the following pertinent quotation by the Court of Appeals in its opinion therein, from a decision of the state court, in a prior action for unfair competition by the same plaintiffs involving the same parody lyrics, as to the nature of such parody versions of the lyrics of plaintiffs' songs, published in defendants' magazine (p. 401):

> "Plaintiffs own, publish, advertise and sell numerous copyrighted popular songs. Defendants have published, sold and distributed magazines containing parodies in which they use the titles of some of plaintiffs' songs, but different words and no music. Presumably, such different words are supposed to be at lease capable of being sung to the tunes of plaintiffs' songs, but no proof of that fact has been made."

The District Court herein, while recognizing as aforesaid "It is clear that a parody of a copyrighted work is an infringement of the copyright", citing *Benny* v. *Loew's Inc.*, *supra*, attempted to distinguish the holding in the Feist and Robbins actions, *supra*, upon the tenuous ground "It is significant that plaintiffs in the *Feist* case, *supra*, had granted licenses to certain publishers of song lyric magazines. Thus, defendants were palming off their lyrics as plaintiffs' and capturing from plaintiffs' licensees some

of the natural market for lyrics of plaintiffs' songs". (R. 165a, 166a)

As this Court said in *Fox Film Corporation* v. *Doyal*, 286 U. S. 123, 127, 52 Sup. Ct. 546 (quoted in *Loew's, Inc.* v. *Columbia Broadcasting System, supra*, 131 F. Supp., p. 184, as a part of the quotation from *Leon* v. *Pacific Tel. & Tel Co.*, 91 F. 2d 484, 9th Cir., which it was said "disposes completely" of the identical contention of defendants' therein), "The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property".

Although plaintiffs in the Court of Appeals herein relied upon the said prior holding of the same Court as well as the holding to the same effect in *Benny* v. *Loew's, Inc., supra*, as being decisive of the identical question of Federal Law in the instant case, it is not understandable how the Court in its opinion could completely disregard such prior adverse holding of the same Court, as applied to like subject matter.

There is no legal precedent for the decision of the Court of Appeals herein.

The Court of Appeals Herein in Holding That a Parody Version Being in Effect Literary or Dramatic Criticism Must Be Treated Differently From Any Other Appropriation Failed to Apply the Applicable Settled Principles of Federal Law in an Action for Copyright Infringement as Applied by the Respective Court of Appeals in the *Benny* and *Feist-Robbins* Actions

Following are the settled principles of Federal Law, which should be applied under the holdings in the Benny and Feist-Robbins actions:

A.

Paraphrasing or copying with evasion is an infringement even though there may be little or no conceivable identity between the two

In the Leading case of *Nutt* v. *National Institute Inc. For The Improvement Of Memory*, 31 F. 2d 236, 237 (2nd Cir.) the same Court had said:

> "Paraphrasing or copying with evasion is an infringement, even though there may be little or no conceivable identity between the two. 13 Corpus Juris, 1109".

In *Ansehl* v. *Puritan*, 61 F. 2d 131, 138 (8th Cir.), cert. den. 287 U. S. 667, 53 Sup. Ct. 291, the Court cited and followed the *Nutt* case, *supra*, in reversing the decree of the District Court dismissing the complaint, saying:

> "The fact that the identical language or the identical illustrations were not used will not justify the appropriation of copyrighted articles. 'Paraphrasing or copying with evasion is an infringement, even though there may be little or no conceivable identity between the two.' Nutt v. Nat. Institute Inc. for the improvement of Memory, supra, at page 237 of 31 F. (2d); Holmes v. Hurst, supra; Callaghan v. Myers, supra; Meccano v. Wagner, supra; West Publishing Co. v. Edward Thompson Co., 169 F. 833 (C. C., E.D.N.Y.); Encyclopaedia Britannica Co. v. American Newspaper Ass'n, supra."

To the same effect:

> *Universal Pictures Co.* v. *Harold Lloyd Corporation*, 162 F. 2d 354, 360 (2d Cir.);

Eisenschiml v. *Fawcett Publications*, 246 F. 2d 598, 603 (7th Cir.), cert. den. 355 U. S. 907, 78 Sup. Ct. 335.

The District Court herein had, as aforesaid, recognized this settled principle of Federal Law (R. p. 164a).

B.

The test of infringement is whether the work is recognizable by ordinary observation as having been taken from the copyrighted source.

In *Fleischer Studios* v. *Ralph A. Freundlich*, 73 F. 2d 276, 278 (2nd Cir.), cert. den. 294 U. S. 717, 155 Sup. Ct. 544, the same Court had said:

> "What the appellant constructed is recognizable by an ordinary observer as having been taken from the copyrighted source. Such is an infringement. Nutt v. National Institute, 31 F. (2d) 236 (C.C.A. 2); Gerlach-Barklow Co. v. Morris & Bendien (C.C.A.) 23 F. (2d) 159."

To the same effect:

> *Allegrini* v. *De Angelis*, 59 F. Supp. 248, 251, aff'd upon opinion below, 149 F. 2d 815 (3rd Cir.);
> *Bradbury* v. *Columbia Broadcasting System, Inc.*, 287 F. 2d 478, 485 (9th Cir.), petition dismissed pursuant to Rule 60 of this Court, 368 U. S. 801, 82 Sup. Ct. 64.

The District Court herein had likewise, as aforesaid, recognized this settled principle of Federal Law (R. 164a). However, the Court of Appeals herein, as aforesaid, held directly to the contrary that, "where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire,

a finding of infringement would be improper" (App. I, *infra*, p. 34).

Obviously, to "recall or conjure up" the object of the satire, the work would necessarily have to be recognizable by ordinary observation as having been taken from the copyrighted source.

C.

Whether a substantial part of a copyrighted work has been taken is a question of quality and value rather than quantity

In *Toksvig* v. *Bruce Pub. Co.*, 181 F. 2d 664, 667 (7th Cir.), the Court said:

> "Ball in his work on the Law of Copyright, 335, states that 'The question of infringement of copyright is not one of quantity but of quality and value.' And, at page 357, it 'depends more upon the value of the extracts than upon their length.' In order to constitute an infringement of the copyright of a book it is not necessary that the whole or even a large portion of the book shall have been copied. It is sufficient if a material and substantial part shall have been copied, even though it be but a small part of the whole, Henry Holt & Co. to use of Felderman v. Liggett & Myers Tobacco Co., supra, 23 F. Supp. 303; West Publishing Co. v. Lawyers' Co-operative Publishing Co., 2 Cir., 79 F. 756; and Ansehl v. Puritan Pharmaceutical Co., 8 Cir., 61 F. 2d 131."

Likewise in *Nikanox* v. *Simon & Schuster*, 144 F. Supp. 375, 380, aff'd 246 F. 2d 501 (2d Cir.), the District Court said:

> "But is such copying a substantial part? We are convinced that the rule is not quantity but the quality of what was copied. • • • In College Entrance Book

Co. v. Amsco Book Co., 2 Cir., 1941, 119 F. 2d 874, 876, the word lists copied constituted 'only a small proportion' (less than 15% of the printed matter), nevertheless, the Court of Appeals said that it was evident that they are of real importance and entitled to copyright protection. In another district the copying of one line has been held an infringement. Henry Holt and Co., to Use of Felderman, Inc. v. Liggett & Myers Tobacco Co., D. C. Pa. 1938, 23 F. Supp. 302. See, too, Chicago Record-Herald Co. v. Tribune Ass'n, 7 Cir., 1921, 275 F. 797."

The Court of Appeals in affirming said (p. 504):

"In our view the court's findings and conclusions with respect to copyright infringement were correct."

"This case is perhaps close to the borderline, but no closer than many others in which copyright protection has been afforded. College Entrance Book Co. v. Amsco Book Co., supra; Deutsch v. Arnold, 2 Cir., 1938, 98 F. 2d 686; Nutt v. National Institute, Inc. for the Improvement of Memory, 2 Cir., 1929, 31 F. 2d 236; Ansehl v. Puritan Pharmaceutical Co., 8 Cir., 1932, 61 F. 2d 131; Adventures in Good Eating v. Best Places to Eat, 7 Cir., 1942, 131 F. 2d 809."

The principal lines of the short chorus of a musical composition, including the repetition of the title as a part thereof, are of the same quality and value thereto as a greater portion of a book, dramatic composition or motion picture photoplay is to such works.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York, New York,
June 1, 1964.

JULIAN T. ABELES,
Attorney for Petitioners.

JULIAN T. ABELES,
JOHN S. CLARK,
Of Counsel.

APPENDIX I

Opinion of the United States Court of Appeals for the Second Circuit, Affirming the Judgment of the United States District Court, Southern District of New York.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 255—September Term, 1963.
(Argued January 10, 1964 Decided March 23, 1964.)
Docket No. 28502

IRVING BERLIN, IRVING BERLIN MUSIC CORPORATION, CHAPPELL & CO., INC., THE PLAYERS MUSIC CORPORATION, DE SYLVA, BROWN & HENDERSON, INC., WILLIAMSON MUSIC, INC., T. B. HARMS COMPANY, MILLS MUSIC, INC., SHAPIRO, BERNSTEIN & CO., INC., ROBBINS MUSIC CORPORATION, LEO FEIST, INC., and MELODY LANE PUBLICATIONS, INC.,

Plaintiffs-Appellants,

—v.—

E. C. PUBLICATIONS, INC., THE AMERICAN NEWS COMPANY, WILLIAM M. GAINES, ALBERT B. FELDSTEIN, JOHN PUTNAM, LEONARD BRENNER, FRANK JACOBS, LARRY SIEGAL and JACK RICKARD,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge*, and
KAUFMAN and MARSHALL, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York, Charles M. Metzner, *J.*, denying plaintiffs-appellants motion for summary judgment and granting the cross-motion of defend-

ants-appellees for summary judgment as to twenty-three of twenty-five causes of action for copyright infringement. Judgment affirmed.

JULIAN T. ABELES, New York, N. Y., *for plaintiffs-appellants.*

MARTIN J. SCHEIMAN, of Scheiman, Albert & MacLean, New York, N. Y. (Jack N. Albert, of counsel), *for defendants-appellees.*

KAUFMAN, *Circuit Judge:*

Through depression and boom, war and peace, Tin Pan Alley has light-heartedly insisted that "the whole world laughs" with a laugher, and that "the best things in life are free." In an apparent departure from these delightful sentiments, the owners of the copyrights upon some twenty-five popular songs instituted this action against the publishers, employees and distributors of "Mad Magazine," alleging that Mad's publication of satiric parody lyrics to plaintiffs' songs infringed the copyrighted originals, despite Mad's failure to reproduce the music of plaintiffs' compositions in any form whatsoever. Twenty-five causes of action were alleged, each representing a particular song copyrighted by the plaintiffs and parodied by the defendants.

On cross-motions under Rule 56, F. R. Civ. P., the District Court awarded summary judgment to the defendants as to twenty-three of the claims, finding no similarities in mood, content, or purpose between the original lyrics and the parodies; concluding that the two remaining causes of action presented closer questions, summary relief was denied both parties as to these two claims. Asserting that the

District Court decision constituted an invitation to plagiarism, the plaintiffs appealed.[1]

The validity of plaintiffs' copyrights has never been challenged, and we need concern ourselves here only with the nature, purpose and effect of the alleged infringements. The parodies were published as a "special bonus" to the Fourth Annual Edition of Mad, whose cover characterized its contents as "More Trash From Mad—A Sickening Collection of Humor and Satire From Past Issues," and almost prophetically carried this admonition for its readers: "For Solo or Group Participation (Followed by Arrest)." Defendants' efforts were billed as "a collection of parody lyrics to 57 old standards which reflect the idiotic world we live in today." Divided into nine categories, ranging from "Songs of Space & The Atom" to "Songs of Sports," each was accompanied by the notation that it was to be "Sung to" or "Sung to the tune of" a well-known popular song—in twenty-five cases, the plaintiffs' copyrighted compositions. So that this musical direction might feasibly be obeyed, the parodies were written in the same meter as the original lyrics.

The District Court observed that the theme and content of the parodies differed markedly from those of the originals. Thus, "The Last Time I Saw Paris," originally written as a nostalgic ballad which tenderly recalled prewar France, became in defendants' hands "The First Time I Saw Maris," a caustic commentary upon the tendency of a baseball hero to become a television pitchman, more prone to tempt injury with the razor blade which he advertises than with the hazards of the game which he plays. Sim-

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[1] Despite the denial of summary judgment as to two causes of action, the dismissal of twenty-three of plaintiffs' claims is clearly appealable at this juncture. 28 U. S. C. § 1292(1) confers jurisdiction upon this Court to hear appeals from interlocutory orders where, as here, a prayer for injunctive relief has been denied.

ilarly, defendants transformed the plaintiffs' "A Pretty Girl Is Like a Melody," into "Louella Schwartz Describes Her Malady"; what was originally a tribute to feminine beauty became a burlesque of a feminine hypochondriac troubled with sleeplessness and a propensity to tell the world of her plight. As might be inferred from the range of categories presented and the foregoing examples of defendants' works, the parodies were as diverse in their targets for satire as they were broad in their humor.

While the plaintiffs have resolutely insisted that the defendants' use of the original songs as a vehicle for the parodies was wrongful, and have alleged, in general terms, that the claimed infringements "caused substantial and irreparable damage," they have not indicated with any degree of particularity the manner in which injury might have been inflicted. There is no allegation akin to "passing-off"; with considerable reason, the plaintiffs have not asserted that the music-buying public could have had any difficulty in differentiating between the works of plaintiffs and defendants. Neither is there a claim that defendants' parodies might satisfy or even partially fulfill the demand for plaintiffs' originals; quite soundly, it is not suggested that "Louella Schwartz Describes Her Malady" might be an acceptable substitute for a potential patron of "A Pretty Girl Is Like a Melody."

Rather, plaintiffs appear to seek redress upon a theory of copyright relief, closely resembling recovery for unjust enrichment. Pointing to the use of the titles, the meter, and an occasional phrase from the original lyrics in an occasional song, the plaintiffs insist that their copyrighted efforts were improperly appropriated by the defendants for their own financial gain. Asserting that the copyright laws restrict the economic benefits of copyrighted works to the copyright holders, they reject the notion that a parody or burlesque version of the original may ever be justified as

a form of "fair use" which traditionally has permitted a literary critic to employ limited quotations from the copyrighted work under review. Cf. *Lawrence* v. *Dana*, 15 Fed. Cas. 25, 61 (No. 8136) (C. C. D. Mass. 1869). Indeed, the plaintiffs broadly maintain, "copying for commercial gain may never be fair use" and thus, in effect, refuse to recognize parody and burlesque as independent forms of creative effort possessing distinctive literary qualities worthy of judicial protection in the public interest.

While indeed broad, the area in which a copyright proprietor is permitted the exclusive commercial benefits of his copyrighted work is clearly not without limit. In the words of Article I, Section 8, of the Constitution, copyright protection is designed "To promote the Progress of Science and useful Arts," and the financial reward guaranteed to the copyright holder is but an incident of this general objective, rather than an end in itself. As a result, courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry. See Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 Harv. L. Rev. 1569 (1963).

Turning to the specific question before us, we find that the extent to which a parodist may borrow from the work he attempts to burlesque is largely unsettled. The earlier American cases, although generally cited in most discussions of the question, are of little assistance. Such decisions as *Bloom & Hamlin* v. *Nixon*, 125 Fed. 977 (C. C. L. D. Pa. 1903); *Green* v. *Minzensheimer*, 177 Fed. 286 (C. C. S. D. N. Y. 1909); and *Green* v. *Luby*, 177 Fed. 287 (C. C. S. D. N. Y. 1909), did not deal with the parody of a copyrighted work, but with imitations of a particular artist's style of performing, in which portions of a copyrighted song were incidentally employed. Cf. *Broadway Music Corp.* v. *F-R*

Pub. Corp., 31 F. Supp. 817 (S. D. N. Y. 940). Alternatively, in *Hill* v. *Whalen & Martell, Inc.*, 220 Fed. 359 (S. D. N. Y. 1914), the defense of "parody" or "burlesque" was clearly invoked in bad faith, as an attempt to justify a taking designed substantially to satisfy the demand for the copyrighted original.

Most contemporary discussions of the treatment to be afforded parody were stimulated by two related cases with arose in the Southern District of California. See *Loew's, Inc.* v. *Columbia Broadcasting System*, 131 F. Supp. 165 (S. D. Cal. 1955), *aff'd sub nom. Benny* v. *Loew's, Inc.*, 239 F. 2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U. S. 43 (1958); *Columbia Pictures Corp.* v. *National Broadcasting Co.*, 137 F. Supp. 348 (S. D. Cal. 1955). In the *Loew's* case, television comedian Jack Benny was alleged to have infringed the copyright upon "Gaslight," a motion picture which he satirized in a televised sketch entitled "Autolight"; in the *Columbia* litigation, "From Here to Obscurity," a television burlesque by comedian Sid Caesar upon the screen version of "From Here to Eternity," was at issue. Although the same District Judge wrote the opinions in both cases, the plaintiffs were permitted to recover for the *Benny* parody, but were denied relief in the *Caesar* case.

The distinction between the two situations, Judge Carter reasoned, turned on the relative significance or "substantiality"—in terms of both quality and quantity—of the material taken from the original motion pictures. In both cases, the Court recognized, in painstaking and scholarly opinions, the historic importance and social value of parody and burlesque; in both, it conceded that the parodist must be permitted sufficient latitude to cause his reader or viewer to "recall or conjure up" the original work if the parody is to be successful. But in Benny's case, the Court concluded, this license had been grossly exceeded. Not only

had the parody followed the general plot of the original motion picture, but specific incidents and details had been copied and extensive portions of the dialogue had been reproduced verbatim. It was this borrowing from the original to a far greater degree than that required if the parody is to "recall or conjure up" that original, which caused the court to reject the defense of "burlesque"; and, it was in this context that the Court of Appeals for the Ninth Circuit affirmed Judge Carter's determination.

But despite Benny's "borrowing" of substantially more material from the copyrighted original than was necessary for a successful burlesque, the *Benny* holding and its accompanying dictum suggesting that parody could not be justified as "fair use" was roundly criticized by many commentators. See, *e.g.*; Comment, *Parody and the Law of Copyright*, 29 Fordham L. Rev. 570 (1961); Note, *Parody and Burlesque—Fair Use or Copyright Infringement?*, 12 Vand. L. Rev. 459 (1959); Note, *Parody and Copyright Infringement*, 56 Colum. L. Rev. 585 (1956). But see Selvin, *Parody and Burlesque of Copyrighted Works as Infringement*, 6 *Copyright Soc'y Bull.* 53 (1958). Several scholars believed that the decisions of both the District Court and the Court of Appeals were unduly restrictive; the fear was expressed that the art of parody, which has thrived from the time of Chaucer to, on a somewhat different level, the current vogue for the lyrics of Allen Sherman, would be stifled if its propriety were tested entirely by the precise amount appropriated from the original.

But we need not concern ourselves further over this conflict, for, in the present case, it is not necessary to determine whether parody and satire require a greater freedom than that afforded by the "substantiality" test outlined in *Benny*. We believe in any event that the parody

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[2] Mr. Selvin was counsel for the successful plaintiffs in the *Benny* case.

lyrics involved in this appeal would be permissible under the most rigorous application of the "substantiality" requirement. The disparities in theme, content and style between the original lyrics and the alleged infringements could hardly be greater. In the vast majority of cases, the rhyme scheme of the parodies bears no relationship whatsoever to that of the originals. While brief phrases of the original lyrics were occasionally injected into the parodies, this practice would seem necessary if the defendants' efforts were to "recall or conjure up" the originals; the humorous effect achieved when a familiar line is interposed in a totally incongruous setting, traditionally a tool of parodists, scarcely amounts to a "substantial" taking, if that standard is not to be woodenly applied. Similarly, the fact that defendants' parodies were written in the same meter as plaintiffs' compositions would seem inevitable if the original was to be recognized, but such a justification is not even necessary; we doubt that even so eminent a composer as plaintiff Irving Berlin should be permitted to claim a property interest in iambic pentameter.

In short, we believe that whatever use was made of the plaintiffs' works in this case fell far short of the "substantial" takings which were involved in *Benny*, even if we were to find the rationale of that opinion persuasive.[2] While the social interest in encouraging the broad gauged burlesques of Mad Magazine is admittedly not readily ap-

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[2] Although the *Benny* decision was affirmed by an equally divided Supreme Court, 356 U. S. 43 (1958), it is clearly not binding upon us. "Under the precedents of this court, and as seems justified by reason as well as by authority, an affirmance by an equally divided court is as between the parties a conclusive determination and adjudication of the matter adjudged, but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts." *Hertz v. Woodman*, 218 U. S. 205, 213-14 (1910).

parent, and our individual tastes may prefer a more subtle brand of humor, this can hardly be dispositive here. Cf. *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239 (1903). For, as a general proposition, we believe that parody and satire *are* deserving of substantial freedom—both as entertainment and as a form of social and literary criticism. As the readers of Cervantes' "Don Quixote" and Swift's "Gulliver's Travels," or the parodies of a modern master such as Max Beerbohm well know, many a true word is indeed spoken in jest. At the very least, where, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to "recall or conjure up" the object of his satire, a finding of infringement would be improper.

Judgment affirmed.

APPENDIX II

Judgment of Affirmance.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of March one thousand nine hundred and sixty-four.

Present: HON. J. EDWARD LUMBARD, Chief Judge,
HON. IRVING R. KAUFMAN,
HON. THURGOOD MARSHALL, Circuit Judges.

IRVING BERLIN, IRVING BERLIN MUSIC CORPORATION, *et al.*,

Plaintiffs-Appellants,

v.

E. C. PUBLICATIONS, INC., *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX III

Copyright Act of March 4, 1909, c. 320 (35 Stat. 1075, et seq., U.S.C. Title 17)

"§ 1 Exclusive Rights As To Copyrighted Works—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;".

"§ 7 (former § 6) Copyright On Compilations Of Works In Public Domain Or Of Copyrighted Works; Subsisting Copyrights Not Affected—Compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other version of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works."

APPENDIX IV

Findings of Fact and Conclusions of Law, of the United States District Court, Southern District of New York, in the Action of Leo Feist, Inc. v. Song Parodies, Inc.

This cause having been commenced by the service of summons and complaint on each of defendants, and the case having come on for trial and having been tried on the 15th day of March, 1944, and the Court having heard the evidence, finds the facts and states the conclusions of law as follows:

Findings of Fact

1. That plaintiffs invoked the jurisdiction of this Court upon the ground that the Copyright Law of the United States is directly involved in the case.

2. That plaintiffs Leo Feist, Inc. and Twentieth Century Music Corporation, and defendant Song Parodies, Inc., are New York corporations, and defendant The Red Star News Company is a New Jersey corporation having its principal office and place of business in the City and State of New York, Southern District of New York.

3. That the song of plaintiff Twentieth Century Music Corporation, entitled "Chattanooga Choo Choo", was copyrighted by it on June 27, 1941; a certificate of registration thereof was issued by the Register of Copyrights to it on July 3, 1941; under date of July 2, 1941, plaintiff Twentieth Century Music Corporation sold and assigned to plaintiff Leo Feist, Inc., the sole and exclusive right to print, reprint, publish, copy and vend said song; and since July 2, 1941, plaintiff Leo Feist, Inc. has been and still is possessed of said sole and exclusive rights and interests therein, and plaintiff Twentieth Century Music Corporation has been and still is the proprietor of said copyright

which has been and still is held in trust by it to the extent of said interest of plaintiff Leo Feist, Inc. therein.

4. That the song of plaintiff Leo Feist, Inc., entitled "How About You", was copyrighted by it on November 19, 1941; a certificate of registration thereof was issued by the Register of Copyrights to it on November 2, 1942; and since November 19, 1941, said plaintiff has been and still is the sole proprietor of all rights, title and interest in and to said copyright.

5. That the song of plaintiff Leo Feist, Inc., entitled "There Won't Be A Shortage Of Love", was copyrighted by it on March 9, 1942; a certificate of registration thereof was issued by the Register of Copyrights to it on November 2, 1942; and since March 9, 1942, said plaintiff has been and still is the sole proprietor of all rights, title and interest in and to said copyright.

6. That the song of plaintiff Leo Feist, Inc., entitled "If He Can Fight Like He Can Love", was copyrighted by it on March 9, 1942; a certificate of registration thereof was issued by the Register of Copyrights to it on November 2, 1942; and since March 9, 1942, said plaintiff has been and still is the sole proprietor of all rights, title and interest in and to said copyright.

7. That the song of plaintiff Leo Feist, Inc., entitled "I'll Take Tallulah", was copyrighted by it on April 9, 1942; a certificate of registration thereof was issued by the Register of Copyrights to it on November 2, 1942; and since April 9, 1942 said plaintiff has been and still is the sole proprietor of all rights, title and interest in and to said copyright.

8. That the song entitled "Over There" was copyrighted by William Jerome Publishing Corp. on June 1, 1917; a

certificate of registration thereof was issued by the Register of Copyrights to it on June 1, 1917; under date of November 7, 1917 said William Jerome Publishing Corp. sold and assigned said copyright to plaintiff Leo Feist, Inc., which assignment was recorded in the copyright office on November 16, 1917; and since November 16, 1917, plaintiff Leo Feist, Inc. has been and still is the sole proprietor of all rights, title and interest in and to said copyright.

9. That thereafter, having access to said songs, defendant Song Parodies, Inc. published and defendant The Red Star News Company distributed and placed upon the market, without authorization or consent of plaintiff Leo Feist, Inc., four song lyric magazines containing twelve song lyrics which were largely copied from the lyrics of said songs, viz.:

Defendants' song lyric magazines	Titles of songs from which lyrics were copied
1. July 1942 issue, "Popular Parody Hit Songs"	"Chattanooga Choo Choo" "How About You" "There Won't Be A Shortage Of Love" "If He Can Fight Like He Can Love" "I'll Take Tallulah"
2. August, 1942 issue, "Popular Parody Hit Songs"	"Chattanooga Choo Choo" "How About You" "If He Can Fight Like He Can Love"
3. October, 1942 issue, "Popular Parody Hit Songs"	"How About You" "Over There"
4. October, 1942 issue, "Hit Parade Parody Songs"	"How About You" "Over There"

10. That at the time of such use by defendants, there was a public demand for said songs which had been created through their extensive exploitation and popularization by plaintiff Leo Feist, Inc., whereby plaintiff Leo Feist, Inc. has been enabled to receive substantial compensation for licensing the use by other publishers of the original and revised lyrics of said songs in their song lyric magazines.

11. That defendants' lyrics are written in the same meter and with the same or substantially the same rhyme, as the lyrics of said songs, and are offered for sale and purchased for the same purpose as the original and revised lyrics of said songs, i. e., to be sung to the music of said songs.

12. That defendants' lyrics represent paraphrasing and copying with evasion, they are a colorable alteration and an evasive imitation of the lyrics of said songs, which ordinary observation would cause to be recognizable as having been taken from the lyrics of said songs.

13. That defendants' use of such lyrics is not a fair use, but an attempt to evade plaintiffs' copyrights, with the intent to use such lyrics for the same purpose as plaintiff Leo Feist, Inc. in meeting the same demand on the same market in the course and conduct of defendants' businesses for profit, thereby impairing the value and prejudicing the sale of said songs.

14. That a judgment was heretofore rendered dismissing the complaint. in an action instituted by plaintiff Leo Feist, Inc. and others against defendants and others in the Supreme Court, New York County, for unfair competition in the use by defendants of the titles of said songs.

Appendix IV

CONCLUSIONS OF LAW.

1. That defendants have infrigned the copyrights in plaintiffs' songs.

2. That the prior action for unfair competition in the use by defendants of the titles of said songs is not res adjudicata of this action for infringement arising under the Copyright Law.

3. That plaintiffs are entitled to an injunction against defendants restraining such infringements.

4. That defendants are liable to plaintiff Leo Feist, Inc. for such damages as it may have suffered due to such infringements, as well as all the profits which defendants shall have made from such infringements.

5. That plaintiffs are entitled to an interlocutory decree, which shall provide for reference to a master to ascertain such damages and profits.

6. That defendants are liable to deliver up on oath for destruction all the infringing copies, as well as all plates, molds, matrices or other means for making such infringing copies, as directed by the Court.

Let judgment be entered accordingly with costs and attorney's fees to plaintiff Leo Feist, Inc.

Dated: New York, N. Y., April 21st, 1944.

ALFRED C. COXE.
U. S. D. J.